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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)

Rulemaking to Amend Part 1 and)
Part 21 of the Commission's Rules)
to Redesignate the 27.5 - 29.5 GHz)
Frequency Band and To Establish)
Rules and Policies For Local)
Multipoint Distribution Services)

CC Docket No. 92-297

Applications for Waiver of the)
Commission's Common Carrier Point-)
to-Point Microwave Radio)
Service Rules)

To: The Commission

PETITION FOR RECONSIDERATION

The City of Gustine, California hereby requests that the Commission reconsider in part its Notice of Proposed Rulemaking, Order, Tentative Decision and Order On Reconsideration ("Notice"), FCC 92-538, released January 8, 1993, denying *inter alia* Gustine's applications¹ for authority to provide a new video distribution service to residents of Gustine and its environs. Notice at ¶¶ 53, 82. For the reasons set forth below, such portion of the Notice as affects Gustine's applications should be reversed. Gustine presented the Commission with compelling waiver requests which the Commission omitted to consider, notwithstanding its duty to do so under well-established law.

¹ Gustine's two applications to serve Gustine and Hatch, California were filed December 31, 1991 (File Nos. 9210734 and 9210733, respectively. Public Notice of the applications appeared February 12, 1992.

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ENCLOSURE

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**I. Gustine's Proposal Presented the FCC
With A Compelling Waiver Showing.**

As set forth in detail in its applications, Gustine has presented the Commission with a unique proposal: A municipality's plan to implement a new and commercially untested technology as a creative response to the needs and interests of local residents.

As discussed in Gustine's applications, the proposal provides a rare opportunity for the 28 GHz technology to be tested under several optimal conditions. For instance, as a municipality Gustine brings genuine institutional stability, in the most fundamental sense of that term, to this video distribution project. Unlike other entities whose interest in this spectrum may be more speculative, Gustine's applications are a wholly straightforward proposition: Gustine will use the technology to provide area residents with an alternative video distribution service.

Additional factors argue in favor of the Commission's careful review of Gustine's proposal. Unlike other applicants whose stability and staying power may be uncertain, Gustine's plan offers the FCC the virtue of permanence. The municipality, incorporated over 75 years ago, is the antithesis of a speculative venture. Similarly, Gustine's fiscal strength will ensure the video distribution system the up-front investment of capital necessary to give the project the best chance of success. The system will be managed and operated by highly experienced personnel who are residents of the area, and who

are discerning of the needs and interests of the local residents. Accordingly, the proposal offers the significant benefits of localism which the FCC has continually sought to promote in its policies.

Gustine's City Council undertook a thorough investigation of the prospect of entering upon this venture. Public meetings were held in which citizens have expressed their views concerning Gustine's operation of a wireless cable service. The local public is supportive of this initiative.

II. Controlling Precedent

Clear instructions concerning the appropriate course for the FCC to follow when presented with a waiver request were laid out over twenty years ago by the U.S. Court of Appeals. The Court directed that the FCC has a general duty to consider waivers of the rules as a matter of administrative due process.

[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.

* * *

[A] system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the 'public interest'...[w]hich includes an obligation to seek out the 'public interest' in particular, individualized cases.

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Applications presented "with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but

must be given a 'hard look'." WAIT Radio, 418 F.2d at 1156. Moreover, the FCC's analysis must be presented in an articulated rationale. Id.

II. The FCC's Blanket Denial of All Pending 28 GHz Applications Assumes Falsely That No Compelling Waiver Applications Were Presented.

In the Notice, the FCC denied all pending waiver requests on the theory that to grant them in toto "would amount to a de facto reallocation of the 28 GHz band," would be "inconsistent with the Commission's suggestion that it would not grant a flood of such requests," and "would be detrimental to the assigned users" of the spectrum. The Commission also stated that it "see[s] no basis for distinguishing among any of the individual requests in an equitable fashion." Id. at ¶ 53.

Petitioner do not dispute that a massive grant of hundreds of waiver requests would have been improper. At the same time, however, the Commission implicitly acknowledged that, had there been a way to differentiate specific waiver proposals from the others, such proposals would merit serious consideration.

Gustine's proposal is clearly distinguishable. We are aware of no other applicant for 28 GHz spectrum which is a municipality, and thus, no other applicant brings to its video distribution proposal the unique features which characterize Gustine's applications. Had the Commission adequately considered Gustine's proposal, we are confident that its virtues would have been immediately evident.

For these reasons, Gustine asks that the FCC reconsider such portion of the Notice as denies its applications, that

this reconsideration petition be granted, and that Gustine's
waiver applications be granted expeditiously.

Respectfully submitted,

CITY OF GUSTINE

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